

For Immediate Release
November 16, 2010

Contact: Will Reisinger
(614) 487-5841 (office)
(540) 250-5976 (cell)
Will@theOEC.org

OEC Appeals PUCO Decision to Supreme Court of Ohio

Eco group alleges PUCO order violates Ohio law and U.S. Constitution

(Columbus, OH)—The Ohio Environmental Council (OEC) is appealing a controversial decision by the Public Utilities Commission of Ohio (PUCO) to approve FirstEnergy Corp.’s proposal to convert a coal-burning power plant to biomass fuel.

The PUCO’s order sets the stage for Ohio to be home to one of the largest biomass facilities in the world—even though the utility has refused to disclose the source of the fuel and even though the PUCO is ignoring Ohio law, which requires the Commission to ensure that the fuel is available on a renewable basis.

In its appeal filed Monday with the Ohio Supreme Court, the OEC alleges that the PUCO order violates both the Commission’s own administrative rules and the United States Constitution’s prohibition on interference with interstate commerce. The OEC believes the PUCO order will grant an undeserved and unlawful windfall profit to the utility.

In a unanimous 5-0 vote, on August 11th the Commission certified the proposal as a “renewable energy” project, which will allow FirstEnergy to replace coal as the fuel source at two generating units at the company’s R.E. Burger facility with an unknown amount and type of biomass, potentially including trees, crops, or other plant material. The Burger facility is a 312-MW electric power plant located on the Ohio River in Shadyside, Ohio.

Will Reisinger, staff attorney for the Ohio Environmental Council and lead counsel on the case, said that the decision could harm both Ohio’s environment and its fledgling renewable energy economy.

“With this decision, the PUCO completely ignored Ohio law, which requires utilities to show that their biomass fuel will be ‘available on a renewable basis’¹ before receiving renewable certification. Despite repeated discovery requests for more information, FirstEnergy has stonewalled and refused to provide any information about the source of its biomass material,” said Reisinger.

¹ Ohio Adm. Code 4901:1-40-01(E): “‘biomass energy’ means energy produced from organic material derived from plants or animals and available on a renewable basis.”

The Commission applied the criteria outlined in Ohio Revised Code Section 4928.64, finding that a renewable energy facility must be “recognized as a renewable energy resource pursuant to sections 4928.64(A)(1) and 4928.01(A)(35).”² However, while biomass qualifies as a renewable energy resource under these code sections, biomass is not defined within the Revised Code, but within Section 4901 of the Ohio Administrative Code.

Ohio Administrative Code Section 4901:1-40-01(E) defines “biomass energy” as “energy produced from organic material derived from plants or animals and *available on a renewable basis*” (emphasis added). The OEC points out that the Commission failed to take the next step required under the law to ensure that the biomass FirstEnergy intends to use is eligible under the Ohio Administrative Code.

“The PUCO made a legal error by not requiring FirstEnergy to demonstrate that its biomass fuel will be ‘available on a renewable basis’ prior to certification, as clearly required by Ohio law,” said Reisinger.

During official discovery proceedings, the company failed to describe the source of its biomass fuel, how the biomass will be transported, or whether the biomass fuel will be obtained using sustainable processes. FirstEnergy also failed to demonstrate that converting the Burger plant from coal to biomass will result in less mercury, particulate matter, or carbon dioxide pollution—or whether Ohio even has enough wood to support the massive project.

Decision Represents Violation of U.S. Constitution, May Slow Growth of Ohio’s Renewable Energy Industry

The PUCO decision also hands FirstEnergy a windfall profit on renewable energy credits (RECs) in violation of the U.S. Constitution.

Under a special law change sought by the Strickland Administration and included last year in the state budget bill, RECs generated at the Burger facility could count for several times more value than a REC generated or traded anywhere else in Ohio.

In its application, FirstEnergy estimated that RECs generated at the Burger plant will be worth four and-a-half times as much as a REC produced or traded by any other generator in Ohio. As such, the PUCO approval would allow the utility giant to earn a disproportionate share of RECs at Burger.

The “Burger Amendment,” which was slipped into the 2009 state budget bill with virtually no debate, could mean that Burger RECs may be worth as much as 4.5 times more than RECs generated by wind, solar, any other form of renewable energy.³

² PUCO Case No. 09-1940-EL-REN, Finding and Order at 2.

³ FirstEnergy, in its official filings, has estimated that Burger RECs could be valued as much as 4.5 times all other RECs. PUCO Case No. 09-1940-EL-REN, FirstEnergy Application at p.26.

The PUCO rejected warnings filed by the American Wind Energy Association that the Burger Amendment could drown out investment in other technologies. AWEA had argued in filings that the PUCO's approval of FirstEnergy's application could inflict "catastrophic effects on Ohio's renewable energy marketplace" leading to a "death spiral' for Ohio's [Renewable Energy Standard]."⁴

Solar, hydropower, and other renewable energy industries—including other biomass facilities—will be placed at a severe disadvantage as a result of this decision.

As a result of the PUCO's decision, FirstEnergy will be allowed to flood Ohio's renewable energy marketplace with disproportionately weighted RECs. In fact, FirstEnergy might not have to undertake any additional renewable energy projects to meet its REC requirements in 2025.

The PUCO's application of the Burger statute also will result in a violation of the U.S. Constitution, said Reisinger.

"The federal Constitution prevents states from placing barriers to interstate commerce, or placing an undue burden on out-of-state competitors. The Burger statute is a direct subsidy for one in-state facility, disadvantaging all out-of-state renewable energy."

-end-

The mission of the Ohio Environmental Council (OEC) is to secure healthy air, land, and water for all who call Ohio home. The OEC is Ohio's leading advocate for fresh air, clean water, and sustainable land use. The OEC has a 40-year history of innovation, pragmatism, and success. Using legislative initiatives, legal action, scientific principles, and statewide partnerships, the OEC secures a healthier environment for Ohio's families and communities. For more information, visit www.theOEC.org.

⁴PUCO Case No. 09-1940-EL-REN, American Wind Energy Association Comments at pp. 2, 5.